Supreme Court, U. S.
FILED
DEC 21 1979
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-891

KENT SAXON,
Petitioner,

vs.

ERLE JOHNSTON, ET AL.,
Respondents.

ON PETITION FOR A WRIT FOR CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

O. B. TRIPLETT, JR.
P. O. Box 247
Forest, Mississippi 39074
Attorney for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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OPINIONS BELOW

The opinion of the Circuit Court of Scott County, Mississippi, the judgment rendered thereon, and the judgment by the Supreme Court of Mississippi affirming the judgment entered below without rendering an opinion, are attached to the Petition for Certiorari as Appendices A, B and C, respectively.

JURISDICTION

Jurisdiction of this Court is invoked by petitioner under Title 28, United States Code, Section 1257(3), which authorizes this Court to take jurisdiction to review the judgment of the Supreme Court, when but only when it affirmatively appears that a Federal question was presented to the Supreme Court of Mississippi and that its decision of the Federal question was necessary to its determination of the cause.

STATUTES INVOLVED

The only Federal statute involved is Title 28, United States Code, Sec. 1257(3).

QUESTIONS PRESENTED

1. If the Supreme Court found that the demurrer was well taken and that the declaration stated no cause of action, could it affirm the case before it and ignore the comments of the Circuit Judge to the effect that the petitioner was a "quasi public figure"?

2. Stated differently, can the Supreme Court of Mississippi affirm a judgment of a lower court even though it finds that the reasoning of the lower court was unsound?

3. Since there was no allegation that plaintiff was a quasi public figure contained in the declaration filed by him in the State Court and reviewed by the State Supreme Court, was there any Federal question presented to the State Supreme Court which it necessarily decided when it affirmed the judgment of the lower court sustaining the demurrer filed by the defendants?

STATEMENT OF FACTS

The facts have been correctly stated by petitioner. The plea in bar concerned publications complained of which occurred more than one year prior to institution of the libel action; and petitioner conceded that they were barred by limitations.

There was no allegation in the declaration which would remotely justify a conclusion that petitioner was a "quasi public figure". The trial court stated in its opinion that it could look only to the allegations contained in the declaration but then erroneously referred to petitioner as a quasi public figure because of allegations contained in an affirmative defense in the answer of respondents.

ARGUMENT

The Demurrer

Petitioner filed his declaration for libel under Mississippi Code of 1972, Section 11-7-53. He did not invoke the provisions of Mississippi Code of 1972, Section 95-1-1, making actionable the publication of insulting words calculated to lead to a breach of the peace. This is a special statute known as "Actionable Words Statute"; and is commonly known as the "Anti-Dueling Statute". While the Actionable Words Statute provides that no demurrer shall be interposed to prevent the jury from passing upon the question as to whether said words are within the statute, the Mississippi Court has repeatedly held that the declaration may be tested by a demurrer. In *Tattis v. Carthans*, 215 So. 2d 685 (Miss. 1968), the Supreme Court said:

> "In actions brought under this statute, the Court has the power to pass on the demurrer where the demurrer

is not based upon a construction of the words but on some other ground evidenced by the declaration."

The Supreme Court made this additional comment:

> "To apply the statute literally, the use of any words, without reference to the occasion or purpose of their use, which, from their usual construction and acceptation, are considered as insults and calculated to lead to a breach of the peace, would be actionable. To so construe the statute would reduce it to an absurdity and prevent one from using words of the character condemned by the statute when necessary to be used in asserting or defending in good faith a claim to right or duty. This Court has uniformly declined to so construe the statute."

Therefore, even if the declaration had charged the use of "actionable words" and not libel, the declaration was reviewable on a general demurrer.

Since *Tattis v. Carthans* was decided in 1968, and the Actionable Words Statute (Appendix D) was re-enacted by the Mississippi Code of 1972, the Legislature of Mississippi adopted the construction placed thereon by the Supreme Court. *Burks v. Moody,* 107 So. 279, 141 Miss. 370.

The Opinion and Decision of the Trial Court

The Supreme Court of Mississippi in *King v. Mississippi Power & Light Company,* 142 So. 2d 222, 244 Miss. 486, prescribed the prerogative of the trial court:

> "When a demurrer is presented to a trial court, only the declaration and the demurrer are looked to, and the latter cannot be aided by an answer or other pleading. White v. Turner, 197 Miss. 265, 19 So. 2d

> 825. Moreover, on demurrer, all material allegations in a declaration are considered as true."

The trial court recognized this rule of law in his opinion but then departed from it with remarks that had no bearing upon his consideration of the demurrer.

The Function of the State Supreme Court

In *Foreman v. Oberlin,* 75 So. 2d 56, 222 Miss. 42, a demurrer was filed to the original bill of complaint and the trial court sustained the demurrer on erroneous reasoning. The Supreme Court, finding that the decree sustaining the demurrer was correct although the supporting grounds and reasoning were unsound, affirmed the decree of the lower court with this comment:

> "Where the chancellor bases his final decree or any other decree, on one ground which is insufficient or erroneous, if there be another ground upon which the decree may be supportive, it must be affirmed. Griffith's Miss. Chancery Practice 2d ed., Note: p. 743; Lee v. Memphis Pub. Co., 195 Miss. 264, 14 So. 2d 351."

The duty of the Mississippi Supreme Court when a lower court makes a correct decision on erroneous grounds, is given the following statement in *State ex rel. Patterson v. Board of Supervisors of Prentiss County,* 234 Miss. 26, 105 So. 2d 154:

> "The denial of the writ and the dismissal of the petition was erroneous on the ground assigned by the lower court; however, if the lower court reached the right result in denying the writ and dismissing the case, this court should affirm the judgment, even if the lower court assigned erroneous reasons for its conclusions. Carney v. Anderson, 214 Miss. 504, 58

So. 2d 13, 59 So. 2d 262, 38 A.L.R. 2d 981. It follows that this court must, when it finds the assigned grounds erroneous, look to the whole case and determine if any other ground for affirmance is present."

Lack of Federal Court Jurisdiction

Since it is conceded by petitioner and by respondents that the declaration contained no allegation that petitioner was a "quasi public figure", and since it is conceded by all parties that the trial court rested his comment that petitioner was a "quasi public figure" upon mere allegations in the answer and not upon the allegations contained in the declaration, and since the Supreme Court, in reviewing the case of petitioner on appeal, had the power and duty to affirm the decision if the judgment of the lower court was correct although the grounds assigned were erroneous, it follows that no Federal question whatsoever was determined by the Supreme Court of Mississippi.

The test of jurisdiction which this Court has consistently applied is laid down in *Lynch v. New York*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191:

> "It is essential to the jurisdiction of this court in reviewing a decision of a court of a state, that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

Should it be contended that the action of the Supreme Court of Mississippi in affirming the judgment of the lower court without a decision necessarily approved of the erroneous reasoning of the trial court, this Court in *Stembridge v. State of Georgia*, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130 made the following reply:

> "Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment."

A similar situation was presented to this Court in *Cuyahoga River Power Company v. Northern Realty Company*, 244 U.S. 300, 37 S.Ct. 643, 61 L.Ed. 1153, to which this Court responded:

> "We so conclude because, looked at from the point of view of the action of the trial court and of the court of appeals, this case presents a single question of what principle is to be applied where, from an absence of an opinion expressed by the court below, it is impossible to say whether its judgment was rested upon state questions adequate to sustain it independent of the Federal questions, or upon such Federal questions, both being in the case. But the rule which controls such a situation has long prevailed and was clearly expressed in Allen v. Arguinbau, 198 U.S. 149, 49 L.Ed. 990, 25 S.Ct. 622 where a writ of error to the Supreme Court of Florida was dismissed as follows: 'The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad; but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction.' "

CONCLUSION

For the reasons assigned, respondents respectfully pray that this petition for a Writ of Certiorari be denied.

Respectfully submitted,

O. B. TRIPLETT, JR.
P. O. Box 247
Forest, Mississippi 39074
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that I have mailed three copies of the foregoing Brief in Opposition to the Petition for Certiorari to the Supreme Court of Mississippi, to Honorable James J. Fougerousse, Attorney, 1214 Capital Towers, Jackson, Miss. 39205, by United States Mail, properly addressed and postage prepaid, on this 20th day of December, 1979.

O. B. TRIPLETT, JR.
Attorney for Respondents